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Real Property -- Spite Fences

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a similar manner with freehold estates, the legislature has generally explicitly specified that certain leases are covered by that statute.[42] This practice avoids the confusion resulting where the legislature redefines "real property" for various purposes.[43]

That an estate vests in the lessee after actual entry is not questioned.[44] However, some doubt remains as to the nature of the lessee's interest prior to actual entry. Although Justice Pearson held[45] that the Statute of Uses obviated the doctrine of *interessi termini*,[46] subsequent courts have discussed the doctrine of *interessi termini* without mentioning the effect of the Statute of Uses.[47] Thus the doctrine of *interessi termini* may still exist in North Carolina.[48]

An estate for years was classified as personal property at common law; North Carolina's construction statute encourages strict construction of specific statutes subjecting estates for years to the law of real property; specific statutes have been well-drafted and clearly state if leases are to be governed by them; the doctrine of *interessi termini* may still be hanging over the court; all these factors support the court's conclusion in the principal case that estates for years are personal property.

HENRY E. COLTON.

Real Property—Spite Fences

B built a "spite fence"[1] on his own property, within one and one-half inches of the windows of the house of *A*, adjoining landowner, effectively cutting off light and air therefrom, whereupon *A* secured an injunction ordering removal, which the Supreme Court of Pennsylvania, on appeal, reversed. The court held that malicious motive did not render a lawful use of property unlawful, that motive in such use was immaterial.[2]

The authorities are agreed that where the motive in erection of the

[42] Example: N. C. GEN. STAT. (1943) §22-2 (". . . and all other leases . . . exceeding in duration three years from the making thereof. . . ."). *But cf.* N. C. GEN. STAT. (1943) §1-76.

[43] Example: WASH. REV. STAT. (1931) §2303 (As used in criminal code "real property" includes every estate, interest and right in lands, tenements and hereditaments.").

[44] Williams v. Randolph & C. Ry., 182 N. C. 267, 108 S. E. 915 (1921) (assignment distinguished from lease in that a lease creates an estate in land); Moring v. Ward, 50 N. C. 272 (1858); 2 BL. COMM. *144.

[45] Moring v. Ward, 50 N. C. 272, 275 (1858).

[46] 2 BL. COMM. *339.

[47] *See* Bunch v. Elizabeth City Lumber Co., 134 N. C. 116, 118, 46 S. E. 24, 25 (1903); State v. Boyce, 109 N. C. 739, 748, 14 S. E. 98, 100 (1891) (concurring opinion); Barneycastle v. Walker, 92 N..C. 198 (1885).

[48] 1 MORDECAI'S LAW LECTURES 531 (Dean Mordecai said: "I will back up Judge Pearson against the field.").

[1] For definitions of the term "spite fence," see Norton v. Randolph, 176 Ala. 381, 385, 58 So. 283, 285, 40 L. R. A. (N. S.) 129, 131 (1912); Burris v. Creech, 220 N. C. 302, 304, 17 S. E. 2d 123, 124 (1941); 39 WORDS AND PHRASES (perm. ed.) 816.

[2] Cohen v. Perrino, 50 A. 2d 348 (Pa. 1947).

structure was primarily beneficial or for a useful purpose of the landowner, and only incidentally malicious, the injury to the adjoining landowner is *damnum absque injuria*.[3] Business competition,[4] securing privacy to premises,[5] building fence to serve as boundary line fence,[6] deadening of incoming noises,[7] and even moving of dilapidated dwelling onto vacant lot in such position as to obstruct light and air[8] have been held to constitute dominant motives of beneficial use.

The question before the court in the principal case was what if the landowner's motive in erecting the structure was not beneficial but malicious?

This court answered that motive was immaterial. There is much authority in support of its view.[9] This is based on the common law theory of absolute ownership of land and is derived from the proposition that, to prevent the acquisition of a negative easement of light and air over property, the owner of such property, of necessity, must obstruct the passage of light and air. In protection of his property in this manner, his motive, even if purely malicious, is of no consequence.[10]

The explanation of the common law view is aptly put by Dean Pound:

> "To the nineteenth century way of thinking the question was simply one of the right of the owner and of the right of his neighbor. Within his physical boundaries the dominion of each was complete. So long as he kept within them and what he did within them was consistent with an equally absolute dominion of the neighbor within his boundaries, the law was to keep its hands off. For the end of law was taken to be a maximum of self-assertion by each, limited only by the possibility of a like self-

[3] 2 C. J. S., Adjoining Landowners §51; see Note, 133 A. L. R. 691, 701 (1941) and cases there cited.

[4] Gallagher v. Dodge, 48 Conn. 387, 40 Am. Rep. 182 (1880). *Contra:* Parker v. Harvey, 164 So. 507 (La. App. 1935) (where competitive motive in erection ignored as factor in determining liability).

[5] D'Inzillo v. Basile, 4 N. Y. S. 2d 293 (1943); *accord:* Stroup v. Rauselbach, 217 Mo. App. 236, 261 S. W. 346 (1924).

[6] *See* Giller v. West, 162 Ind. 17, 69 N. E. 548 (1904).

[7] Daniel v. Birmingham Dental Manuf. Co., 207 Ala. 659, 93 So. 652 (1922).

[8] White v. Bernhart, 41 Idaho 665, 241 Pac. 367, 43 A. L. R. 23 (1925).

[9] Biber v. O'Brien, 138 Cal. App. 353, 32 P. 2d 425 (1934); Fisher v. Feige, 137 Cal. 39, 69 Pac. 618 (1902); Honsel v. Conant, 12 Ill. App. 259 (1882); Giller v. West, 162 Ind. 17, 69 N. E. 548 (1904); Triplett v. Jackson, 5 Kan. App. 777, 48 Pac. 931 (1897); Saddler v. Alexander, 56 S. W. 518, 21 Ky. Law Rep. 518 (1900); Lord v. Langdon, 91 Me. 221, 39 Atl. 552 (1898); Rideout v. Knox, 148 Mass. 368, 12 Am. St. Rep. 560 (1889); Bordeaux v. Greene, 22 Mont. 254, 56 Pac. 218 (1899); Howe v. Standard Oil Co. of Indiana, 150 S. W. 2d 496 (Mo. App. 1941); Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765 (1896); Karasek v. Peier, 22 Wash. 419, 61 Pac. 33 (1900); Koblegard v. Hale, 60 W. Va. 37, 53 S. E. 793 (1906); Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308 (1900). *See* Capital Airways v. Indianapolis Power and Light Co., 215 Ind. 462, 466, 18 N. E. 2d 776, 778 (1939). The United States Supreme Court recognized this line of cases in Camfield v. United States, 167 U. S. 518, 523 (1896) as the majority view, but termed it "unjust."

[10] Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765 (1896).

> assertion by all. If, therefore, he built a fence eight feet high cutting off light and air from his neighbor . . . this was consistent with his neighbor's doing the same; it was an exercise of his incidental *jus utendi,* and the mere circumstance that he did it out of unmixed malice was quite immaterial since it in no way infringed the liberty or invaded the property of the neighbor."[11]

In this country today the utility element of the common law theory has disappeared, for the doctrine of ancient lights is not generally applied.[12] And an easement of light and air cannot be acquired by prescription. This also is the law in Pennsylvania.[13]

In opposition to the principal case stands the modern trend allowing redress in the spite fence cases[14] and the criticism that the common law doctrine stated above has received in the better decisions.

For many courts have vigorously asserted that motive was of prime importance in these cases.[15] Thus spite structures have been held private nuisances and abated,[16] or damages have been allowed.[17] This line of decisions proceeds on the theory that the right to use one's property primarily for the purpose of injuring others is not a right of ownership,[18] that instead, there must be legal cause or excuse for injury to another to render it remediless.[19] The North Carolina court in *Barger v. Barringer,*[20] a leading case for this view, declares that every person, in the use of his property, should avoid injury to his neighbor as much as possible. The reasonableness of an interference with a landowner's use

[11] POUND, THE SPIRIT OF THE COMMON LAW 196.

[12] 4 TIFFANY, REAL PROPERTY §1194 n. 74 (3rd ed., Jones, 1939) and cases there cited. *Contra:* Clawson v. Primrose, 4 Del. Ch. 643 (1873).

[13] Beckershoff v. Bomba, 112 Pa. Super. 294, 170 Atl. 449 (1934); Haverstick v. Sipe, 33 Pa. 368 (1859).

[14] Note, 11 VA. L. REV. 122 (1925) for development of trend. See note 15 *infra* for later cases.

[15] Norton v. Randolph, 176 Ala. 381, 58 So. 283 (1912); Griffin v. Northridge, 64 Cal. App. 2d 69, 153 P. 2d 800 (1944); Hornsby v. Smith, 191 Ga. 491, 13 S. E. 2d 20, 133 A. L. R. 684 (1941); Humphrey v. Mansbach, 265 Ky. 675, 97 S. W. 2d 573 (1936); Parker v. Harvey, 164 So. 507 (La. App. 1935); Burke v. Smith, 69 Mich. 380, 37 N. W. 838, 8 L. R. A. 184 (1888); Dunbar v. O'Brien, 117 Neb. 245, 220 N. W. 278, 58 A. L. R. 1033 (1928); Burris v. Creech, 220 N. C. 302, 17 S. E. 2d 123 (1941); Barger v. Barringer, 151 N. C. 433, 66 S. E. 439, 25 L. R. A. (N. S.) 831, 19 Ann. Cas. 472 (1909); Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945 (1903); Hibbard v. Halliday, 58 Okla. 244, 158 Pac. 1158, L. R. A. 1916F, 903 (1916); Racich v. Mastrovich, 65 S. D. 321, 273 N. W. 660 (1937). Note, 18 N. C. L. REV. 261 (1940).

[16] Norton v. Randolph, 176 Ala. 381, 58 So. 283 (1912); Hornsby v. Smith, 191 Ga. 491, 13 S. E. 2d 20 (1941); Parker v. Harvey, 164 So. 507 (La. App. 1935); Burke v. Smith, 69 Mich. 380, 37 N. W. 838 (1888); Burris v. Creech, 220 N. C. 302, 17 S. E. 2d 123 (1941); Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945 (1903).

[17] Griffin v. Northridge, 64 Cal. App. 2d 69, 153 P. 2d 800 (1944); Humphrey v. Mansbach, 265 Ky. 675, 97 S. W. 2d 573 (1936); Barger v. Barringer, 151 N. C. 433, 66 S. E. 439 (1909); Hibbard v. Halliday, 58 Okla. 244, 158 Pac. 1158 (1916).

[18] *See* Burke v. Smith, 69 Mich. 380, 389, 37 N. W. 838, 842 (1888).

[19] Barger v. Barringer, 151 N. C. 433, 66 S. E. 439 (1909).

[20] *Ibid.*

of his land may well depend upon the actor's motive in interfering.[21]

Pennsylvania has a statute which declares a fence erected or maintained solely with a malicious motive to be a private nuisance.[22] Erection or maintenance of a structure of this nature is further made a misdemeanor.[23] However, the statute is only applicable to suburban districts of cities of the first class (those with one million of population). Inasmuch as the opinion of the supreme court, as well as that of the chancellor in the trial report, did not mention the existence of the statute, its operation apparently does not extend to the *locus*[24] involved in the principal case.

Thirteen other states have enacted statutes prohibiting or giving some remedy to persons injured by the erection or maintenance of spite fences.[25] The Pennsylvania statute is unique in its application to limited areas within the state. The statutes are construed strictly in favor of the owner of the structure as they are in derogation of the common law.[26] The statutes are interpreted to require that malice must be the dominant motive in the erection.[27] Their constitutional validity has been upheld generally under the police power of the various jurisdictions.[28]

[21] PROSSER, TORTS §5 n. 59 (1941). *Compare* American Bank and Trust Co. v. Federal Reserve Bank, 256 U. S. 340 (1921) *with* South Royalton Bank v. Suffolk Bank, 27 Vt. 505 (1854) and Silliman v. Dober, 165 Minn. 87, 205 N. W. 696 (1925) *with* St. Charles Mercantile Co. v. Armour and Co., 156 S. C. 397, 153 S. E. 473 (1930).

[22] PA. STAT. ANN. (Purdon, Cum. Supp. 1946) tit. 53, §4231. It shall be unlawful for the owner or occupant of any improved premises, in any suburban district of a city or borough (whether the premises concerned be assessed at rural, suburban, or city rates) to erect any fence, or structure resembling a fence, or to reerect during the process of repairing, any fence previously erected, upon any part of the front yard, lawn, or space of said premises, or on or along the boundary line thereof, of a greater height than four feet, if the height in excess of the said four feet is unnecessary, or if the same is maliciously erected, elevated, and maintained for the purpose of annoying the owner or occupant of the adjoining premises. Every such fence or structure, so maliciously erected, elevated and maintained in excess of four feet in height, shall be deemed and is hereby declared to be, a private nuisance.

[23] PA. STAT. ANN. (Purdon, 1938) tit. 53, §4232. Any person or persons erecting and maintaining the fence or structure described in section one hereof (§4231 above) as unlawful and prohibited, shall be deemed guilty of a misdemeanor, and if convicted thereof, shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days or not more than six months, or by both fine and imprisonment to said respective amount and extent, at the discretion of the trial judge.

[24] 450-452 Wharton Street, Philadelphia, Pa.

[25] The statutes are collected and discussed in Note, 25 KY. L. J. 356 (1937).

[26] One Hundred and Twenty-Two East Fortieth Street Corp. v. Dranyam Realty Corp., 226 App. Div. 78, 234 N. Y. Supp. 384 (1929).

[27] Healy v. Spaulding, 104 Me. 122, 71 Atl. 472 (1908); Rideout v. Knox, 148 Mass. 368, 19 N. E. 390 (1889); Hunt v. Coggin, 66 N. H. 140, 20 Atl. 250 (1889).

[28] Saperstein v. Berman, 119 Misc. 205, 195 N. Y. Supp. 1 (1922); Rideout v. Knox, 148 Mass. 368, 19 N. E. 390 (1889). *See* Camfield v. United States, 167 U. S. 518, 523 (1896).

The Pennsylvania statute and the *Restatement of Torts*,[29] as well as a recent appellate decision pointing the way,[30] should have enabled the court to find a basis for a principle more in keeping with the needs of the community.

G. L. GRANTHAM, JR.

[29] 4 RESTATEMENT, TORTS §829 (1939). . . . An intentional invasion of another's interest in the use and enjoyment of land is unreasonable and the actor is liable when the harm is substantial and his conduct is
(a) inspired solely by hostility and a desire to cause harm to the other; or
(b) contrary to common standards of decency.
Illustration:
A and *B* own adjoining residences. A quarrel between them results in hard feelings, and *A* builds a fence 25 feet high along the boundary between his lot and *B*'s lot. *A*'s sole purpose in building this fence was to annoy *B* by shutting out the light and view from his windows. *A*'s conduct is malicious and he is liable to *B*.

[30] Feathers v. Baer, 52 Pa. D. & C. 305 (1944) (where a spite fence was abated by mandatory injunction even in absence of application of the Pennsylvania statute).